MICHIGAN SUPREME COURT

Office of Public Information

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FOR IMMEDIATE RELEASE

PARENTAL RIGHTS TERMINATION DISPUTE BEFORE SUPREME COURT THIS WEEK

LANSING, MI, April 7, 2003 – Eleven cases, including a dispute over termination of parental rights, will come before the Michigan Supreme Court this week for oral argument.

At issue in *In re J.K., Minor*, is whether a mother's parental rights were properly terminated for lack of bonding, where the child was originally removed from his mother's custody because of her drug abuse.

Also before the Court is *Anderson* v. *Pine Knob Ski Resort*. At issue in that case is whether the state's Ski Area Safety Act bars a claim by a skier who crashed into a timing shack at the resort during a grand slalom competition.

Of the nine remaining cases before the Court, five are civil cases and four concern criminal law matters.

Court will be held **April 8, 9, and 10** in the Supreme Court Room on the sixth floor of the Michigan Hall of Justice. Court will convene at **9:30 a.m.** each day.

(*Please note: The summaries that follow are brief accounts of complicated cases and might not reflect the way in which some or all of the Court's seven Justices view the cases. The attorneys may also disagree about the facts, the issues, the procedural history, or the significance of their cases. For further details about these cases, please contact the attorneys*.)

Tuesday, April 8, 2003
Morning session

PEOPLE v. WATKINS (case no. 120036)
Prosecuting attorney: Jerrold Schrotenboer/517.788.4283
Attorney for defendant Prentice Devell Watkins: Donald R. Cook/313.964.6677
At issue: Was it ineffective assistance of counsel to have the court determine the degree of murder instead of proceeding to a bench trial? Was the error in compelling defendant to testify a

"structural error" or a "trial error"?
Background: Prentice Devell Watkins was charged in the shooting death of Allen Russell Stewart. At a hearing on November 4, 1999, Watkins pled guilty open murder and felony-firearm, and claimed that he shot Stewart after the two fought. On November 8, 1999, the court held a hearing to determine the degree of murder that Watkins had committed. Jackson County Circuit Judge Alexander C. Perlos called Watkins as a witness, and he was questioned both by the court and the prosecution. Defense counsel did not object to the court calling Watkins as a witness or to Watkins' testimony. Watkins denied robbing Stewart and continued to insist that the shooting occurred as the two fought. In an oral decision following the degree hearing, the judge found that Watkins planned to rob Stewart and that the shooting could not have happened in the way Watkins described. The judge concluded that the killing constituted felony murder because it occurred during the course of a robbery. Watkins appealed, arguing in part that the trial court erred in compelling him to testify against himself at the degree hearing. In a published opinion, the Court of Appeals agreed that the trial court should not have called Watkins as a witness at the degree hearing. However, the error was harmless, the Court of Appeals concluded. Calling Watkins as a witness amounted to a "trial error" – in other words, an error in the presentation of one particular portion of the case, not a "structural error" which would have rendered the entire framework of the case defective, the Court of Appeals stated. Watkins appeals.

PEOPLE v. MCNALLY (case no. 120021)
Prosecuting attorney: John S. Pallas/248.858.0681
Attorney for defendant Stephen J. McNally: Marla R. McCowan/313.256.9833
At issue: May the prosecution point of the defendant's failure to volunteer information to the police at the time of his arrest, if an ordinary citizen could be expected to do so, even though the defendant was under no compulsion to speak?
Background: Late one night, Stephen McNally was driving in his truck with Harold VanDorn. The two men had met in a bar earlier that evening and both were intoxicated. An altercation developed and they exchanged punches. VanDorn got out of the truck and started walking. McNally drove a short distance away from VanDorn, made a U-turn, and then accelerated in VanDorn's direction. At a speed of approximately 45 mph, McNally drove the truck over the centerline and ran over VanDorn killing him. McNally was arrested and prosecuted for murder. At a trial before Oakland County Circuit Judge Rudy J. Nichols, McNally claimed that the homicide was unintentional and was caused by a mechanical failure which caused him to lose control of the truck. The prosecutor, in questioning the arresting officer, elicited testimony that, at the time of arrest, McNally did not volunteer that the homicide was an accident caused by a mechanical failure of the truck. The prosecutor argued that an ordinary citizen normally would have spoken out at the time of arrest if the homicide truly was an accident. The jury found McNally guilty of second-degree murder and failure to stop at the scene of a serious injury accident. He was sentenced to concurrent prison terms of 20 to 50 years for murder and 2 to 5 years for failure to stop. McNally appealed. He argued in part that his constitutional rights to a fair trial and due process were violated. By bringing out McNally's failure to speak when he was arrested, the prosecutor violated McNally's privilege against self-incrimination, McNally contended. The Court of Appeals affirmed the conviction in an unpublished per curiam opinion.

McNally appeals.

PEOPLE v. PETTY (case no. 121564)
Prosecuting attorney: Joseph A. Puleo/313.833.2914
Attorney for defendant Gregory Petty: Valerie R. Newman/313.256.9833
At issue: Where a minor has been convicted as an adult, a judge must hold a hearing to decide whether to send the minor to prison, or to a juvenile disposition. At that hearing, the judge must consider certain factors in deciding whether to sentence the minor as an adult. How specifically must the judge address those factors? Did the judge in this case explain his decision sufficiently?
Background: The 15-year-old defendant, Gregory Petty, was found guilty of aiding and abetting 12-year-old McKinley Moore, who shot and killed a fleeing robbery victim. A witness testified that he saw both Petty and Moore pursue the victim, and that he heard Petty yell something to Moore as Moore went through the victim's pockets after the victim fell. Petty then ran to the victim and went through one of his pockets. At the trial, videotape evidence obtained from a nearby gas station surveillance camera suggested that Petty selected and identified the victim as the target for his 12-year-old companion. A dispositional hearing was held in order to decide whether to sentence Petty as a juvenile or an adult. Wayne County Circuit (Family Division) Judge Freddie G. Burton, Jr. sentenced Petty to life without parole. In an unpublished per curiam opinion, the Court of Appeals affirmed Petty's convictions of felony murder and felony firearm, but ruled that Petty must be resentenced. Under the Michigan Probate Code and Michigan Court Rule 5.955, a judge deciding whether to sentence a minor as an adult "shall consider" a number of factors, including the seriousness of the offense, the minor's prior record, the minor's culpability in committing the offense, the adequacy of the punishment or programming available in the juvenile justice system, the dispositional options available for the minor, and other criteria. The Court of Appeals believed that the trial judge may have considered all the statutory factors, but stated that the judge had not engaged in the appropriate required factfinding which assured that he had effectively fulfilled his duty under the statute. The Court of Appeals also found that the trial judge erred by failing to ask Petty if he had anything to say before the court imposed sentence. The prosecution appeals.

Afternoon session

BARNOWSKY v. GENERAL MOTORS CORPORATION (case no. 120768)
Attorney for plaintiff Joseph A. Barnowsky: Daryl Royal/313.730.0055
Attorney for defendant General Motors Corporation: Martin L. Critchell/313.961.8690
At issue: A worker's compensation magistrate found that the plaintiff had physical and mental disabilities, but did not explicitly order the employer to pay medical expenses related to the mental disability. Is the employer liable for the medical expenses?
Background: In December 1996, a worker's compensation magistrate found that Joseph Barnowsky was disabled from work at General Motors, owing to carpal tunnel and work-related mental injuries. General Motors was directed to pay weekly benefits and to pay for necessary and reasonable medical treatment for the physical disability. The magistrate, however, did not mention paying for psychological treatment. General Motors appealed the ruling as to the amount of weekly benefits that the magistrate awarded to Barnowsky. Barnowsky cross-

appealed based on the magistrate's failure to include medical expenses for psychiatric care. The Worker's Compensation Appellate Commission (WCAC) dismissed Barnowsky's appeal, saying that his appeal was not timely. Barnowsky did not appeal the WCAC's decision. When General Motors declined to pay all bills for psychiatric care, Barnowsky petitioned the magistrate, seeking payment and a penalty against General Motors. The magistrate indicated that omitting payment for mental treatment in the original order was inadvertent, and issued another order directing General Motors to pay. General Motors appealed to the WCAC. The WCAC concluded that the legal doctrine of res judicata barred Barnowsky's recovery. In other words, the magistrate's first order was final and could not be altered. In an unpublished decision, a 2-1 Court of Appeals majority reversed the WCAC. The Court of Appeals held that res judicata did not prevent the magistrate from correcting what amounted to a clerical error. In dissent, Judge Brian Zahra found plaintiff's failure to timely appeal the magistrate's first order meant that the plaintiff forfeited the issue. General Motors appeals.

PEOPLE v. PERKS (case no. 120899)
Prosecuting attorney: William J. Vailliencourt, Jr./517.546.1850
Attorney for defendant Dennis Michael Perks: Randy E. Davidson/313.256.9833
At issue: The defendant pled guilty to two offenses. Later, his probation was revoked at a contested hearing, and he was sentenced to prison. He seeks leave to appeal. Is his appeal by right, or only by leave of the court?
Background: In 1999, Dennis Michael Perks pled no contest in Livingston County Circuit Court before Judge Daniel Burress to a single count of domestic violence, second offense, and to a single count of resisting and obstructing a police officer. He also pled to habitual fourth felony offender. The judge gave Perks two years probation on the domestic violence conviction and imposed a three-year probation with six months in jail (with work release after sixty days) on the count of resisting arrest as a habitual offender conviction. By late August 2001, Perks had been charged with probation violation for assaulting his girlfriend. At a contested probation violation hearing, the court revoked the probation and gave Perks six to 15 years in prison. In 2001, Perks filed a claim of appeal as of right, but Chief Judge of the Court of Appeals dismissed Perks' claim. The Court of Appeals lacked jurisdiction because Perks' no contest plea was not appealable as of right, the judge stated. Under a 1994 amendment to the Michigan Constitution, an accused who pleads no contest or guilty to a crime can only appeal by leave of the court, not by right, except as otherwise provided by law. Since the trial court's judgment was based on Perks' plea to the underlying crime, the appeal must be by leave only, the judge concluded. Perks appeals.

Wednesday, April 9, 2003
Morning session

LITTLE v. KIN (case no. 121037)
Attorney for plaintiffs Robert and Barbara Little: Ronald E. Reynolds/248.851.3434
Attorney for defendants Steven and Rosalyn Kin, et al.: William H. Horton/248.457.7000
Attorney for amicus curiae Michigan Lake and Stream Associations, Inc.: Clifford H. Bloom/616.459.1171

At issue: Does an easement giving property owners riparian rights include the right to build a dock?
Background: The property at issue is located on Pine Lake in West Bloomfield Township and is divided into six lots, with two being front lots on the lake and the remaining four being back lots. The deed provides for an easement up the mid-lien of the property to a section of shoreline 66' wide and 30' deep; the easement is "for access to and use of the riparian rights to Pine Lake." Robert and Barbara Little own one of the two front lots, which they purchased in 1976. Steven and Rosalyn Kin own the lot immediately behind the Littles' lot, and Thomas and Darlene Trivan own the second lot behind the Littles' property. The Littles sued in 1998 in Oakland County Circuit Court; they sought an order preventing the Kins and the Trivans from constructing a dock on the lakefront. The Littles alleged that the township restricted docks and similar use to lakefront property owners. The township ordinance required ownership of a minimum of 110' of lakefront property to place a boat and dock on Pine Lake. Oakland County Circuit Judge Alice Gilbert held that an easement purporting to give riparian rights only gave access to and use of the lake for swimming, fishing, bathing, wading, boating, and similar activities. The judge stated that the easement did "not include the right to construct fixtures, including, but not necessarily limited to, docks, and/or boat hoists." That right belonged exclusively to the riparian owners, the judge concluded. The Court of Appeals reversed in a published opinion. The panel stated that the trial court erred in holding that non-riparian lot owners may not maintain a dock on another's riparian land as a matter of law. The plaintiffs appeal.

HARVEY v. STATE OF MICHIGAN (case no. 121672)
Attorney for plaintiffs Annabelle R. Harvey, et al./Chester E. Kasiborski, Jr./313.961.1900
Attorneys for defendants State of Michigan, et al.: Solicitor General Thomas L. Casey and Stephen M. Rideout/517.373.1174
At issue: Outstate district judges claimed their right to equal protection right of the law was violated by a statute that treats judges of the 36th District Court in Detroit differently than other district court judges as to their retirement benefits. What level of constitutional review should be applied to this issue?
Background: In 1994, the plaintiffs, retired "outstate" district judges, sued the State of Michigan, the Department of Management and Budget, the Bureau of Retirement Services, and the Judges Retirement Board. The plaintiffs contended that they were denied equal protection under the Michigan Constitution. They based their claim on provisions in the Judges Retirement Act that treat judges of the 36th District in Detroit differently than outstate judges. The statute provides that 36th District Court judges are entitled to a retirement benefit calculated on a compensation level including both the salary paid to them by the state and the salary paid to them by the district control unit of the 36th District Court. Other district court judges are paid a retirement benefit based on compensation including only the salary paid by the state. The applicable statute has been in place since 1980. Ingham County Circuit Judge Lawrence M. Glazer granted summary disposition in favor of the defendants and dismissed the case, finding that there was no equal protection violation. The Court of Appeals reversed in an unpublished opinion, holding that the trial court should have used the "heightened or intermediate level rather than the rational basis test" used by the trial court. Under the "rational basis" test, the state must

show that a statutory classification is rationally related to a legitimate state interest. Under the more stringent intermediate level test, the state must show that the classification scheme furthers an important government interest. On remand, the trial court again ruled that there was no equal protection violation even under the intermediate level of scrutiny. The Court of Appeals again reversed, in a published opinion, and remanded for further proceedings. The panel concluded that, whatever historical reasons might have justified treating 36th District judges differently in 1980, those historical facts could no longer justify more favorable benefits for those judges. The defendants appeal.

AFSCME v. CITY OF DETROIT, ET AL. (case nos. 122053, 122091)
Attorney for plaintiff AFSCME: Renate Klass/248.559.2110
Attorneys for intervening plaintiffs Detroit City Council: Robert W. Palmer/248.398.9800, F. Philip Colista/313.961.8400
Attorney for defendants City of Detroit and Detroit Housing Commission: John H. Willems/ 313.963.6420
At issue: Are employees of the Detroit Housing Commission employees of the City of Detroit?
Background: In 1933, the City of Detroit established the Detroit Housing Commission (DHC) under the state's housing act. In 1995, the U.S. Department of Housing and Urban Development and the City of Detroit entered into agreements aimed in part at separating DHC from the City's governmental systems. In 1996, the state Legislature passed Public Act 338, which amended the Housing Facilities Act to provide that housing commissions, such as the DHC, are distinct public bodies corporate with enumerated independent powers and authorities. In addition, in accordance with the amendments, DHC was statutorily authorized to employ and fix the compensation of its director and other employees, and to prescribe their duties. In July 2001, relying on the 1996 amendments, then-Detroit Mayor Dennis Archer notified the Detroit City Council that the DHC would begin functioning as a separate "public body corporate." In response, the City Council adopted a resolution expressly rejecting the declaration that the DHC was a separate employer under the Housing Act. The resolution further declared that all city employees assigned to the DHC, now and in the future, are City employees. Wayne County Circuit Judge Robert L. Ziolkowski held that all persons employed at DHC were to remain employees of the City of Detroit. The Court of Appeals reversed in a published decision. The Court of Appeals also held that the 1996 amendments to the Michigan Housing Facilities Act severed the City's employment relationship with DHC employees by operation of law. AFSCME and the City Council appeal.

Afternoon session

IN RE J.K., MINOR (case no. 121410)
Attorney for J.K.: Mark Van Slooten/616.363.8844
Attorney for petitioner Family Independence Agency: Kent W. Quadiru/616.336.3577
Attorney for respondent Melissa Kucharski: Peter P. Walsh/616.942.1111
At issue: A child was removed from his mother's custody because of her drug problems. A trial judge later found that substance abuse was no longer a problem for the mother. The judge terminated the mother's parental rights, however, based on a lack of bonding between the mother and her child, and for the mother's alleged failure to solve that problem. The mother argues that

the bonding issue was raised late in the proceedings and that termination was improper because she successfully completed the terms of a parent-agency agreement.
Background: Melissa Kucharski and her son J. K. were both made wards of the court, due to Kucharski's substance abuse. The child was removed from her custody in April 1999. The Family Independence Agency ultimately sought to terminate Kucharski's parental rights. A termination hearing was held, and Kent County Probate Judge Patricia D. Gardner issued an decision in March 2001 terminating Kucharski's parental rights. The judge found that Kucharski's substance abuse issues during pregnancy and after J. K.'s birth were the primary reasons he was made a temporary ward of the court. The judge also found that substance abuse was no longer a barrier to reunification, and that the primary reasons for the termination request were bonding and attachment problems between Kucharski and J. K. Although Kucharski had in many respects made significant improvement, the judges said, she had not corrected all of the conditions that caused J. K. to come within the court's jurisdiction. Judge Gardner further held that there was no reasonable likelihood that those conditions would be rectified within a reasonable time considering J.K.'s age, which was between three and three and a half years of age at the time of Judge Gardner's decision. The Court of Appeals affirmed in an unpublished per curiam opinion. Kucharski appeals. She argues in part that the state failed to prove by clear and convincing evidence that the termination was justified by a lack of bonding and attachment. She also contends that her parental rights cannot be terminated where she has successfully completed all the requirements of a parent-agency agreement.

Thursday, April 10, 2003
Morning session only

ANDERSON v. PINE KNOB SKI RESORT, INC. (case no. 121587)
Attorneys for plaintiffs Robert R. Anderson and Christine M. Anderson as Next Friends of Robert C. Anderson, a minor: James P. Feeney, Raymond M. Kethledge/248.258.1580
Attorney for defendant Pine Knob Ski Resort, Inc.: Robert L. Bunting/248.628.5150
At issue: Does the state's Ski Area Safety Act bar a claim by a skier who crashed into a timing shack at defendant's ski resort?
Background: In January 1999, Robert C. Anderson, then a sophomore at Detroit Country Day School, was a member of the school's varsity ski team. During a giant slalom competition held at Pine Knob Ski Resort, Anderson lost his balance and crashed into a timing shack near the finish line. His injuries included several broken bones in his right arm and left leg. Anderson's parents sued Pine Knob as individuals and on behalf of their son. They asserted that the timing shack was negligently positioned because it was only eight to 15 feet from the finish line, and claimed that Pine Knob knowingly allowed a dangerous and hazardous condition on its premises. Pine Knob moved to dismiss the case, contending that the Andersons' claim was barred by the Ski Area Safety Act (SASA), which provides in part that "Each person who participates in the sport of skiing accepts the dangers that inhere in that sport insofar as the dangers are obvious and necessary. Those dangers include, but are not limited to, injuries which can result from variations in terrain; surface or subsurface snow or ice conditions; bare spots; rocks, trees, and other forms of natural growth or debris; collisions with ski lift towers and their components, with other skiers, or with properly marked or plainly visible snow-making or snow-grooming

equipment." Oakland County Circuit Judge Gene Schnelz denied Pine Knob's motion. He found that the SASA did not bar the Andersons' claim and that there was a question of fact about whether the timing shack was placed too close to the finish line of the race course. The Court of Appeals affirmed the trial judge in an unpublished per curiam opinion, noting in part that the timing shack was "not enumerated in the [SASA's] list of 'obvious and necessary' risks assumed by a skier." Pine Knob appeals.

RAKESTRAW v. GENERAL DYNAMICS LAND SYSTEMS (case no. 120996)
Attorney for plaintiff E.W. Rakestraw: John A. Braden/231.830.9190
Attorney for General Dynamics Land Systems: Martin L. Critchell/313.961.8690
Attorney for amicus curiae Michigan Self-Insurers' Association and Michigan Manufacturers' Association: Gerald M. Marcinkoski/248.433.1414
Attorney for amicus curiae Michigan Trial Lawyers Association: Daryl Royal/313.730.0555
At issue: The plaintiff had a preexisting back condition. Work caused his pain to worsen. Is the aggravation of an preexisting injury's symptoms an injury for which worker's compensation benefits should be paid?
Background: Before working for General Dynamics Land Systems, plaintiff E. W. Rakestraw underwent fusion of his cervical discs. He was asymptomatic at the time he started work for General Dynamics. Rakestraw alleged that the work he did for General Dynamics caused his neck pain to return and increase. A worker's compensation magistrate found that Rakestraw should be awarded benefits for the aggravation of his symptoms. The Worker's Compensation Appellate Commission affirmed the magistrate. The Court of Appeals denied General Dynamics' request for leave to appeal. On appeal to the Supreme Court, General Dynamics argues that the aggravation of pain from a pre-existing condition, as opposed to aggravation of the pathology of the pre-existing condition, does not constitute a "personal injury" under the Worker's Disability Compensation Act. Rakestraw argues in part that "personal injury" is a broad term that encompasses non-pathological injuries.

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